

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
February 20, 2008 Session

STATE OF TENNESSEE v. KENNETH W. SNELL

Appeal from the Circuit Court for Rutherford County
No. F-57740 Donald Harris, Senior Judge

No. M2007-01531-CCA-R3-CD - Filed July 3, 2008

The Appellant, Kenneth W. Snell, appeals the sentencing decision of the Rutherford County Circuit Court denying his request for judicial diversion. Snell was convicted by a jury of the crimes of reckless aggravated assault, a Class D felony, and domestic assault, a misdemeanor. The trial court originally denied Snell's request for judicial diversion, instead imposing concurrent suspended sentences in conjunction with three years of supervised probation. A panel of this court vacated the sentencing decision and remanded the case in order for the trial court to explain adequately on the record why Snell was denied judicial diversion. *State v. Kenneth W. Snell*, No. M2006-1088-CCA-R3-CD (Tenn. Crim. App. at Nashville, Dec. 19, 2006). On remand, the trial court entered an order articulating its reasoning for denying Snell's request for judicial diversion, specifically finding that the circumstances of the offense and deterrence value outweighed the positive factors presented for consideration. Snell again argues that the trial court abused its discretion in weighing the required factors. After a thorough review of the arguments of the parties and the record, we affirm.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

DAVID G. HAYES, SR.J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and NORMA MCGEE OGLE, JJ., joined.

John G. Mitchell, Jr. and Darwin K. Colston, Murfreesboro, Tennessee (at trial); David L. Raybin and Sarah S. Richter, Nashville, Tennessee (on appeal), for the Appellant, Kenneth W. Snell.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; William C. Whitesell, Jr, District Attorney General; Trevor H. Lynch and Thomas S. Santel, Jr., Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

Factual Background & Procedural History

A Rutherford County jury found the Appellant guilty of reckless aggravated assault and domestic assault. The facts underlying the convictions were recited by this court as follows:

[A]ccording to the [A]ppellant's presentence report, on December 13, 2003, the [A]ppellant was waiting on his ex-girlfriend, Susan Lester, to return to her home. When she arrived, she went into her kitchen and told the [A]ppellant to leave. He refused, and they got into an argument. The [A]ppellant punched Lester on her left jaw, knocking her down and causing her to hit her head on the refrigerator. Two men, who had arrived home with Lester, went to help her and tried to get the [A]ppellant to leave. The [A]ppellant got into a physical altercation with the men and then went outside and got a gun out of his pickup truck's glove box. He fired two rounds at close range, striking one of the men, Michael Shane Ross, in the upper left chest. The [A]ppellant fled the scene but was later arrested. According to the [A]ppellant's statement in the presentence report, Ross and the second man chased him, and the [A]ppellant fell. The two men hit and kicked him, but the [A]ppellant was able to break away and run to his truck. The men chased the [A]ppellant to the driver's side door, and the [A]ppellant jumped into the truck, grabbed his gun, and fired two shots.

Kenneth W. Snell, No. M2006-01088-CCA-R3-CD. At the sentencing hearing, Ross testified that, as a result of the gunshot to his chest, he was unable to maintain his employment at Bridgestone and, as a consequence, lost his medical insurance coverage. In the victim impact statement, Ross explained that he still has "fragments of bullets and bone in his chest . . . [and] nerve damage on [the] left side of [his] body." He asserted that he is without funds to obtain further needed surgery and medical treatment.

The Appellant testified at the sentencing that he is thirty-eight years old, a graduate of Middle Tennessee State University, and lives with his girlfriend, who is the victim of the domestic assault. The Appellant acknowledged that he and the victim are the parents of an eighteen-month-old son, who was conceived while the Appellant was on bond for the current offenses. The Appellant is employed as the general manager of an automobile dealership in Murfreesboro. Numerous letters were submitted to the trial court attesting to the Appellant's good character.

At the conclusion of the hearing, the trial court sentenced the Appellant to two years for reckless aggravated assault and to six months for domestic assault. Although the trial court denied the Appellant's request for judicial diversion, it granted his request for full probation, imposing a term of three years. On direct appeal to this court, a panel of this court concluded that the trial court erred in denying judicial diversion without considering all of the required factors and vacated the judgment of the trial court. *Id.* The case was then remanded in order for the trial court to adequately explain on the record why the Appellant was denied judicial diversion and why the factors relied upon outweighed the others. *Id.* Following remand, the trial court entered an order on May 10, 2007, in which it articulated its specific findings supporting its denial of judicial diversion.

Analysis

On appeal, the Appellant contends that the trial court abused its discretion in denying judicial diversion. Specifically, he argues that the trial court only focused upon two of the required factors, namely the circumstances of the offense and the deterrence value to the accused, and that it “ignor[ed] the majority of the other factors which weighed in favor of granting [the Appellant] judicial diversion.”

A defendant is eligible for judicial diversion when he or she is found guilty or pleads guilty to a Class C, D, or E felony and has not previously been convicted of a felony or a Class A misdemeanor. *See* T.C.A. § 40-35-313(a)(1)(B)(i) (2003). With these requirements in mind, it is undisputed that the Appellant is eligible for judicial diversion. When a trial court grants a defendant judicial diversion, it defers further proceedings and places the accused on probation without entering a judgment of guilty. *Id.* § 40-35-313(a)(1)(A). If the defendant successfully completes the requisite probationary period, the trial court is required to discharge the defendant and dismiss the proceedings, *id.* § 40-35-313(a)(2), and the defendant may have the official records of the proceedings expunged after dismissal of the proceedings. *Id.* § 40-35-313(b).

The decision of whether to grant a request of judicial diversion lies within the sound discretion of the trial court, and this court will not disturb that decision on appeal absent an abuse of discretion. *State v. Robinson*, 139 S.W.3d 661, 665 (Tenn. Crim. App. 2004). When a defendant challenges the trial court’s denial of judicial diversion, we may not revisit the issue if the record contains any substantial evidence supporting the trial court’s decision. *State v. Cutshaw*, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997); *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996).

In deciding whether to grant judicial diversion, the trial court must consider the following factors: (1) the accused’s amenability to correction; (2) the circumstances of the offense; (3) the accused’s criminal record; (4) the accused’s social history; (5) the status of the accused’s physical and mental health; (6) the deterrence value to the accused as well as others; and (7) whether judicial diversion will serve the ends of justice. *State v. Electroplating, Inc.*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998); *Parker*, 932 S.W.2d at 958 (Tenn. Crim. App. 1996). The record must indicate that the court has weighed all of the factors in reaching its determination. *Electroplating, Inc.*, 990 S.W.2d at 229. If the trial court denied the request for judicial diversion, it should state in the record “the specific reasons for its determinations.” *Parker*, 932 S.W.2d at 958-59. If the trial court “based its determinations on only some of the factors, it must explain why these factors outweigh the others.” *Electroplating, Inc.*, 990 S.W.2d at 229.

On remand, the trial court entered an order in which it articulated its considerations of the required factors regarding judicial diversion:

The most significant factor was the nature and circumstances of the offense. The [Appellant] . . . was convicted of reckless aggravated assault. The incident involved his being thrown out of the apartment of his girl friend by two men after the [Appellant] had assaulted her. The [Appellant] went to his truck, followed by the two men. When he arrived at his truck, he reached into the glove compartment,

retrieved a pistol and shot twice in the direction of the two men, striking one of them in the chest. The gunshot wound could easily have resulted in the death of the victim. The court agreed with the jury that the shots were not fired in self defense but were the result of anger and poor judgment.

[The Appellant] has no prior criminal record except for a traffic offense. His social history was good. He apparently came from a good family and was taught appropriate values during his childhood. He graduated from Riverdale High School in Murfreesboro in 1985. He later attended Middle Tennessee State University where he earned a Bachelor of Science [d]egree in 1994. He is employed as the general manager of Stones River Motors, an automobile dealership located in Murfreesboro and owned by his father, Kenneth Snell, Sr. The [Appellant]'s physical and mental health were good.

The [Appellant] was generally thought to be amenable to correction. The [Appellant] was using alcohol at the time of the instant offense and testified he had discontinued the use of alcohol since the incident had occurred. Because the offense arose out of anger and poor judgment, however, the amenability to correction may not be a significant factor. The [Appellant] also had a permit to carry the handgun he used in the offense. The court would not be comfortable with the [Appellant] being allowed to continue carrying a weapon. A criminal conviction rather than diversion would result in his not being allowed to carry a weapon, and thus create a significant deterrent to the [Appellant]'s committing a similar offense in the future. If the [Appellant] is not allowed to possess a deadly weapon, the court is reasonably satisfied he will never again commit a similar offense. For that reason, the court believed an alternative to incarceration was appropriate in this case.

Because the victim was shot in a way that could easily have resulted in his death, the court considered this a serious offense. Because of the seriousness of the offense, the court believed it appropriate to deny diversion in favor of a felony conviction that would result in deterrence benefitting both the public and the [Appellant] and better serving the ends of justice. Achieving such a result, in the opinion of the court, outweighed the favorable factors set forth above.

Judicial diversion is similar to pretrial diversion; however, judicial diversion follows a determination of guilt, and the decision to grant judicial diversion rests with the trial court rather than the prosecutor. *State v. Anderson*, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992). In *State v. Washington*, a case involving pretrial diversion, our supreme court held that “while the circumstances of the case and the need for deterrence may be considered [by the district attorney] as two of many factors [supporting denial of diversion], they cannot be given controlling weight unless they are ‘of such overwhelming significance that they [necessarily] outweigh all other factors.’” 866 S.W.2d 950, 951 (Tenn. 1993). The *Washington* court further held, “in the absence of such exceptional circumstances, ‘the district attorney general must consider evidence which tends

to show that the applicant is amenable to correction [by diversion] and is not likely to commit further acts.” *Id.* In *State v. Curry*, another pretrial diversion case, our supreme court held that the circumstances of the offense and the need for deterrence may alone justify a denial of diversion, but only if all of the relevant factors have been considered as well. 988 S.W.2d 153, 158 (Tenn. 1999); *see also State v. Herron*, 767 S.W.2d 151, 156 (Tenn. 1989) (holding that review of diversion requires “more than an abstract statement” in the record that the positive factors for diversion have been considered), *overruled in part on other grounds by State v. Yancey*, 69 S.W.3d 553 (Tenn. 2002). Although these decisions involved pretrial diversion, rather than judicial diversion as in the case *sub judice*, we note that “judicial diversion is similar in purpose to pretrial diversion and is to be imposed within the discretion of the trial court subject only to the same constraints applicable to prosecutors in applying pretrial diversion under [Tennessee Code Annotated section] 40-15-105.” *Anderson*, 857 S.W.2d at 572; *see also State v. Louis Leslie Myles*, No. M2005-01671-CCA-R3-CD (Tenn. Crim. App. at Nashville, May 25, 2006) (applying *Herron* and *Curry* holdings to a trial court’s denial of judicial diversion), *perm. app. denied*, (Tenn. Oct. 2, 2006).

In its order denying the Appellant judicial diversion, the trial court found that the circumstances of the offense and the deterrence value to the accused outweighed the applicable positive factors supporting a grant of diversion. As to the circumstances of the offense, the trial court appropriately noted that one of the victims, Mr. Ross, “was shot in a way that could easily have resulted in his death.” The court clearly considered the Appellant’s positive social history, his lack of a criminal record, and his mental and physical health. Although the trial court found that the Appellant “was generally thought to be amenable to correction,” it attributed little weight to this factor, based upon its finding that the offense occurred as a result of “anger and poor judgment.” The trial court was also persuaded that the prohibition of the Appellant from carrying a gun as a result of the felony conviction would serve as a significant deterrent to the Appellant’s committing a similar offense in the future and would better serve the ends of justice. We acknowledge the Appellant’s argument that his conviction for domestic assault under federal law would prohibit possession of a handgun, *see* 18 U.S.C.A. § 922(d)(9), thus, diversion of the felony conviction, while leaving intact the domestic assault conviction, would accomplish the stated objective of the trial court. This argument, however, does not negate the trial court’s finding with regard to the serious nature and circumstances of the offense and the deterrence value “benefitting . . . the public.” The order of the trial court clearly demonstrates that the trial court afforded due consideration to all of the required factors. As the record in the present case contains substantial evidence supporting the decision of the trial court, we conclude that it did not abuse its discretion in denying the Appellant’s request for judicial diversion.

CONCLUSION

Based upon the foregoing, the judgments of the Rutherford County Circuit Court are affirmed.

DAVID G. HAYES, SENIOR JUDGE